

BEFORE THE
Federal Communications Commission

WASHINGTON, DC

ORIGINAL

In the Matter of:)

ICO SERVICES LIMITED)

RM No. 9328

Petition for Expedited Rulemaking to
Establish Eligibility Requirements for
the 2 GHz Mobile Satellite Service)

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TO: Chief, International Bureau

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OPPOSITION OF
MOBILE COMMUNICATIONS HOLDINGS, INC.
TO PETITION FOR EXPEDITED RULEMAKING OF
ICO SERVICES LIMITED

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OPPOSITION OF
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TO PETITION FOR EXPEDITED RULEMAKING OF
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I. INTRODUCTION

Mobile Communications Holdings, Inc. ("MCHI"),¹ by its attorneys, hereby submits this Opposition to the Petition for Expedited Rule Making ("Petition") to

¹ MCHI filed an application in the 2 GHz processing round (see, infra, note 2) seeking Federal Communications Commission authorization to launch and operate a second generation satellite system consisting of 26 non-geostationary ("NGSO") satellites in elliptical and circular low earth orbits (the "ELLIPSO 2G" system) in the 2 GHz band for the provision of voice and data communications services. See FCC File No. 180-SAT-P/LA-97(26). In addition, MCHI holds an authorization to construct, launch, and operate a global "Big LEO" satellite system comprised of 16 NGSO satellites in elliptical and equatorial low earth orbits (the "ELLIPSO" system) for the provision of voice, data, paging/messaging, and other narrowband communications services on a global basis. FCC File Nos. 11-DSS-P-91(6); 18-DSS-P-91(18); 11 SAT-LA-95; 12 SAT-AMEND-95; 158-SAT-AMEND-96. If MCHI is granted an authorization by the Federal Communications Commission, MCHI intends to operate the ELLIPSO 2G satellite system in conjunction with the ELLIPSO satellite system. See FCC File No. 180-SAT-P/LA-97(26).

Establish Eligibility Requirements for the 2 GHz Mobile Satellite Service filed by ICO Services Limited ("ICO").² As set forth herein, ICO's Petition is premature, repetitive, and plainly does not warrant consideration by the Commission and, therefore, should be dismissed or denied promptly pursuant to Section 1.401(e) of the Rules of the Commission.³ In addition, the Commission has expressly stated previously that the issues raised in ICO's Petition will be fully addressed by the Commission in the course of the Commission's ongoing 2 GHz rulemaking proceeding and processing round ("2 GHz Proceeding").⁴ For these reason, MCHI does not address herein the substantive proposals offered in ICO's Petition,⁵ but instead respectfully requests the Commission to

² Petition for Expedited Rule Making to Establish Eligibility Requirements for the 2 GHz Mobile Satellite Service, filed by ICO Services Limited on July 17, 1998 (RM No. 9328) ("Petition").

³ Section 1.401(e) establishes a variety of grounds for the dismissal or denial of a petition for rulemaking, at least three of which apply to ICO's Petition. 47 C.F.R. § 1.401(e) ("Petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner.").

⁴ See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, Notice of Proposed Rulemaking, 10 FCC Rcd 3230 (1995) ("2 GHz Rulemaking I"), First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 7388 (1997) ("2 GHz Rulemaking II"); Cut-off Established for Additional Space Station Applications, Letters of Intent, and Amendments to Pending Applications in the 2 GHz Proceeding, Public Notice, 12 FCC Rcd 10446 (1997) ("2 GHz Cut-Off Notice"); Clarification and Corrections to Public Notices Report Nos. SPB-88 and SPB-89 Establishing Deadlines for Applications, Letters of Intent, and Amendments to Applications in the 2 GHz and 36-51.4 GHz Frequency Bands, Public Notice, 12 FCC Rcd 12050 (1997); Satellite Policy Branch Information: Satellite Applications and Letters of Intent Accepted for Filing in the 2 GHz Band, Public Notice, Report No. SPB-119 (rel. March 19, 1998) ("2 GHz Applications Notice").

⁵ MCHI does not herein address the substantive proposals set forth in ICO's Petition both because the Petition promptly should be dismissed or denied by the Commission and because MCHI has thoroughly expounded upon its view regarding these matters in its previous filings in the 2 GHz Proceeding. See Petitions to Deny and Comments of

immediately dismiss or deny ICO's Petition because it is a transparent attempt to gain an unfair and inequitable advantage in the Commission's 2 GHz Proceeding.

II. ICO'S PETITION SHOULD BE DISMISSED OR DENIED PURSUANT TO SECTION 1.401(E) OF THE RULES OF THE COMMISSION BECAUSE IT IS PREMATURE, REPETITIVE, AND PLAINLY DOES NOT WARRANT CONSIDERATION BY THE COMMISSION

A. ICO's Petition Promptly Should be Dismissed or Denied as Premature Because the Commission Intends to Address the Issues Discussed in ICO's Petition in the Ongoing 2 GHz Proceeding But Has Not Yet Requested Additional Comments From the Applicants Regarding These Issues

ICO's Petition is prematurely filed because the Commission has not yet requested additional comments in the 2 GHz Proceeding. Thus, pursuant to Section 1.104(e) of the Rules of the Commission, the Petition should be dismissed or denied. The Commission has repeatedly made clear since it initiated the 2 GHz Proceeding in 1995⁶ that it intends to authorize applicants⁷ to utilize spectrum at 1990-2025 MHz and 2165-2200 MHz ("2 GHz Spectrum") to provide Mobile-Satellite Service ("MSS") through a processing round

Mobile Communications Holdings, Inc., filed on May 4, 1998; Consolidated Reply Comments of Mobile Communications Holdings, Inc, filed on June 3, 1998; and Consolidated Response of Mobile Communications Holdings, Inc, filed on June 18, 1998. In addition, MCHI petitioned the Commission to deny ICO's application to provide MSS in the United States using the 2 GHz Spectrum because of competitive concerns arising from ICO's status as an affiliate of an intergovernmental organization. See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Report and Order, 12 FCC Rcd 24094. 2450-51, at ¶¶ 130-31 (1997).

⁶ 2 GHz Rulemaking I, ¶ 1.

⁷ MCHI will use herein the terms "application" and "applicant" in reference to: (1) a company requesting the Commission to issue a United States space station license which authorizes the use of the 2 GHz spectrum to provide MSS; and (2) a company holding or

associated with the proceeding.⁸ Earlier this year, the Commission solicited comments, reply comments, and responses regarding the nine applications timely filed with the Commission.⁹ After fully reviewing these applications and the relevant comments pertaining thereto, the Commission should determine the extent to which the applications are mutually exclusive. The Commission would thereafter normally develop technical requirements for the provision of MSS using the 2 GHz Spectrum and a systematic means of apportioning the spectrum.¹⁰

Rather than wait for the Commission to complete its review of the applications and the comments, propose additional 2 GHz requirements, and request additional comments on the newly proposed requirements, ICO requests the Commission to initiate a new rulemaking solely to evaluate the technical, financial, and legal qualifications proposed by ICO. ICO cited no compelling reason for the Commission to extend such extraordinary treatment and to do so at the expense of all other 2 GHz applicants. The Commission should not permit ICO to disrupt the 2 GHz proceeding by entertaining ICO's premature proposals. Rather, in compliance with its earlier commitment, the Commission should complete its review of the mutual exclusivity of the 2 GHz MSS

pursuing a foreign space station license that is seeking access to the 2 GHz Spectrum in the United States for the provision of MSS.

⁸ 2 GHz Cut-Off Notice, 1.

⁹ 2 GHz Applications Notice, 4 (soliciting comments or petitions regarding the application by May 4, 1998; replies and oppositions by June 3, 1998; and responses by June 18, 1998).

¹⁰ 2 GHz Rulemaking II, ¶ 54 (deferring its decision regarding how to apportion the 2 GHz Spectrum until after applications to use the spectrum have been filed because the Commission "will not know if there is mutual exclusivity" until the Commission has reviewed the applications); see also, infra, note 10.

applications and comments thereon and promulgate a further notice of proposed rulemaking proposing technical and legal requirements and a method of apportioning the 2 GHz Spectrum. ICO's substantive proposals regarding these matters should not be entertained by the Commission prior to the Commission's release of such a notice and should only be evaluated concurrently with the comments of the other applicants.¹¹

B. ICO's Petition Promptly Should be Dismissed or Denied Because the Petition is Repetitive of Previous Filings By ICO in the 2 GHz Proceeding

ICO's Petition should be dismissed or denied, pursuant to Section 1.401(e) of the Rules of the Commission, because it is entirely repetitive of comments previously filed by ICO in the 2 GHz Proceeding. Recognizing that the issues that ICO discusses in its Petition are only appropriately addressed by the Commission in the context of the Commission's ongoing 2 GHz Proceeding,¹² ICO has, on three occasions, filed comments with the Commission in the 2 GHz Proceeding, the substance of which closely mirror

¹¹ See Amendment of Parts 2 and 94 of the Commission's Rules to Allocate Spectrum in the 896-901 MHz and 935-940 MHz Frequency Bands for Multiple Address System and Point-to-Point Operations, Order, 4 FCC Rcd 4979, ¶¶ 1, 5 (1989) (dismissing a petition for rulemaking as premature under 47 C.F.R. § 1.401(e) because the petitioner requested the Commission "to eliminate the third stage of [its] licensing procedures" before it had "completed the first stage or initiated the second stage"); see also Mr. Michael Scott Clem, President, Trident Media and Broadcasting, Ltd., Letter, 13 FCC Rcd 4808 (1997) (dismissing a petition for rulemaking because it did "not provide sufficient reason to justify the institution of a separate rulemaking" when "the Commission has a pending proceeding" addressing and "inseparable from" the same issue).

¹² 2 GHz Rulemaking II, ¶ 51 (deferring consideration of a variety of technical issues until after the Commission has accepted applications for system licenses to use the 2 GHz Spectrum); 2 GHz Rulemaking I, ¶¶ 16, 17 (seeking comment "on any other sharing or technical matters that may be pertinent to this proposal," and whether "competitive bidding for MSS licenses in the proposed bands are appropriate for awarding licenses").

ICO's Petition.¹³ Thus, the substantive recommendations presented in ICO's Petition are already properly before the Commission in the context of the 2 GHz Proceeding and the Commission should not waste its limited resources by once again evaluating ICO's redundant 2 GHz proposals and requiring interested parties to draft additional and repetitive comments regarding those proposals. Rather, in accordance with the Commission's well-established policy regarding petitions for rulemaking which address issues already subject to pending rulemakings, the Commission should promptly dismiss or deny ICO's Petition.¹⁴

¹³ See Consolidated Comments of ICO Services Limited, filed on May 4, 1998, at 1-11; Consolidated Reply Comments of ICO Services Limited, filed on June 3, 1998, at 2-10; ICO's Consolidated Response to Reply Comments, filed on June 18, 1998, at 2-6.

¹⁴ See Amendment of Part 73 of the Commission's Rules Concerning Equal Opportunity in the Broadcast Radio and Television Service, *Report and Order*, 2 FCC Rcd 3967, 3970, ¶ 23 (1987) ("In view of these considerations, we are dismissing UCC's petition [for rulemaking] under Section 1.401(e) of the rules on the grounds that the issues raised therein are repetitive of matters under consideration in this proceeding and do not warrant consideration in a separate proceeding . . ."); see also Amendment of Section 90.267 of the Commission's Rules and Regulations to Require Licensing of 450 MHz 12.5 kHz Offset Channel Stations as Base, Fixed or Mobile Relay Stations, *Order*, 7 FCC Rcd 3115, ¶ 2 (1992) (upholding the dismissal of a rulemaking because the "petition appear[ed] indistinguishable from [a previous petition], offering similar proposals and providing no new information or arguments in support of the proposals"); Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), *Memorandum Opinion and Order*, 4 FCC Rcd 1710, ¶ 10 (1989) (holding that "the Bureau's action dismissing the Petition as repetitive is correct under Section 1.401(e)" because "the petition restated the same arguments made and considered by the Commission" in prior rulemakings.)).

C. ICO's Petition is a Transparent Attempt to Gain an Unfair Advantage in the 2 GHz Proceeding and Thus Plainly Does Not Warrant Commission Consideration and Promptly Should be Dismissed or Denied

Because ICO's Petition is a transparent attempt to gain an unfair advantage in the pending 2 GHz Proceeding, ICO's Petition plainly does not warrant consideration by the Commission and promptly should be dismissed or denied pursuant to Section 1.401(e) of the Rules of the Commission. Rather than allowing the Commission to address ICO's proposals regarding the 2 GHz Proceeding alongside the proposals of other applicants in the proceeding, ICO requests the Commission to initiate a separate rulemaking solely to consider ICO's proposals. Such unfair and unequal treatment of ICO's proposals is unwarranted and discriminatory and should not be tolerated by the Commission.

The only justification offered by ICO for its request is that "ICO plans to commence offering [MSS] . . . in the United States in the year 2000" and the "regulatory uncertainty" attached to the 2 GHz Proceeding "could significantly delay the provision of competitive MSS in the United States by ICO"¹⁵ Of course, MCHI shares ICO's concern regarding any delay in the provision of MSS to the American public caused by the lack of a clear schedule or procedure for the evaluation of applications in the 2 GHz proceeding.¹⁶ However, the means by which ICO suggests that the Commission address

¹⁵ ICO Petition, 3. ICO notes that its "spacecraft are under construction, and the first launch is scheduled for the last quarter of 1998." *Id.* To the extent that ICO constructed and contracted for the launch of its spacecraft in reliance on the Commission's ultimate approval of ICO's use of the 2 GHz Spectrum to provide MSS in the United States, ICO did so at its own risk that such approval would not be forthcoming or would be delayed. It is well established that such reliance is not an appropriate justification for expedited and preferential treatment of ICO's application in the 2 GHz proceeding.

¹⁶ Unlike ICO, MCHI has endorsed a cooperative means of achieving this mutually beneficial goal—a negotiated rulemaking. *See* Petitions to Deny and Comments of

this concern is absurdly discriminatory and wholly unacceptable. In effect, ICO suggests that the Commission provide ICO with immediate, exclusive, and unfettered access to the entire 2 GHz Spectrum while the Commission proceeds to review the other applications.¹⁷ Such disparate treatment of a single applicant is entirely inappropriate and unjustified and should be summarily rejected by the Commission.

III. CONCLUSION

For the reasons set forth above, ICO's Petition should be dismissed or denied pursuant to Section 1.401(e) of the Rules of the Commission. ICO's Petition is premature because the Commission has not yet requested additional comment in the 2

Mobile Communications Holdings, Inc., filed on May 4, 1998, at 11, 15; Consolidated Reply Comments of Mobile Communications Holdings, Inc, filed on June 3, 1998, at 8; and Consolidated Response of Mobile Communications Holdings, Inc, filed on June 18, 1998, at 5.

¹⁷ In its Petition, ICO requests the Commission to establish an initial processing round to evaluate, using the Big LEO service rules, applicants that propose to provide global MSS and that do not hold any other Commission authorizations to provide MSS in the United States. ICO requests the Commission to permit such "qualified" applicants to utilize the entire 2 GHz Spectrum while the Commission evaluates the remaining applicants. MCHI, Constellation Communications, Inc. (FCC File No. 181-SAT-P/LA-97(46)), Globalstar, L.P. (FCC File Nos. 182-SAT-P/LA-97(64) and 183 through 186-SAT-P/LA-97), and Iridium, LLC (FCC File No. 187-SAT-P/LA-97(96) hold authorizations to provide MSS in the United States; Inmarsat Horizons (FCC File No. 190-SAT-LOI-97) and TMI Communications and Company, L.P. (FCC File No. 189-SAT-LOI-97) have coordinated substantial spectrum internationally to provide MSS in North America and are currently seeking authorization to provide MSS in the United States; Celsat, Inc. (FCC File Nos. 26/27/28-DSS-P/LA-97 and 88-SAT-AMEND-98) and TMI Communications and Company, L.P. (FCC File No. 189-SAT-LOI-97) proposed regional, rather than global, MSS systems; and The Boeing Company, at least arguably, has proposed to construct a non-MSS satellite system. Thus, under ICO's proposal, ICO is the only applicant that qualifies for initial, expedited access to the entire 2 GHz Spectrum and ICO, in effect, has requested Commission authorization to fully utilize the 2 GHz Spectrum while the Commission evaluates the other applications.

GHz processing round and does not intend to do so until it has had an opportunity to review the degree to which the applications are mutually exclusive. In addition, the substantive proposals set forth in ICO's Petition are entirely repetitive of arguments made in each of ICO's three filings in the 2 GHz proceeding. Finally, ICO's Petition is an unfair and inappropriate attempt to gain preferential treatment in the 2 GHz proceeding and advantageous access to the 2 GHz Spectrum and, as such, does not warrant Commission consideration.

Respectfully Submitted,

MOBILE COMMUNICATIONS
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/s/ Jill Asbeshouse Stern

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Date: August 27, 1998

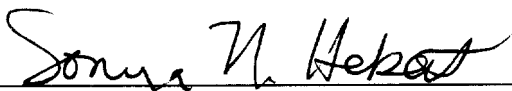
Certificate of Service

I, Sonya N. Hebert, do hereby certify that the foregoing **PETITION FOR EXPEDITED RULE MAKING TO ESTABLISH ELIGIBILITY REQUIREMENTS FOR THE 2 GHZ MOBILE SATELLITE SERVICE** was delivered, via hand delivery, on this 27th day of August, 1998, to the following:

Magalie Roman Salas Secretary Federal Communications Commission 1919 M Street, N.W., Room 222 Washington, D.C. 20554	Chairman William E. Kennard Federal Communications Commission 1919 M Street, N.W., Room 814 Washington, D.C. 20554
Commissioner Harold Furchtgott-Roth Federal Communications Commission 1919 M Street, N.W., Room 802 Washington, D.C. 20554	Commissioner Michael Powell Federal Communications Commission 1919 M Street, N.W., Room 844 Washington, D.C. 20554
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